

addresses the remaining issues identified in the Court's August 8, 2023 Amended Order and includes a proposed order regarding the scope of the Phase I trial.

I. Scope of the Phase I Trial

The Private Plaintiffs propose that the parties proceed on all claims during the September 11 Phase I trial with the caveat that the trial record remain open with respect to claims for intentional discrimination pending resolution of *LUPE v. Bettencourt*, No. 23-50201 (5th Cir.), and any related subsequent discovery, consistent with the Court's proposal in its Amended Order. *See* ECF No. 700 at 2 n.2.¹ The Plaintiffs agree that their remaining claims will be ripe for resolution upon completion of the Phase I trial (or upon resolution of the fully briefed and pending motions for summary judgment, which may be resolved before, during, or after the Phase I trial). Under Plaintiffs' proposal, the parties would be permitted to introduce evidence relating to all claims during Phase I of the trial and the Phase II trial would be limited to evidence that could be informed by or derived from the outcome of the *Bettencourt* appeal.

The Plaintiffs believe that this proposal best serves the interests of the parties, witnesses, and the Court. These consolidated cases have been pending for nearly two years and involve numerous parties, witnesses, and important claims that will impact upcoming elections in Texas. Presenting as much of the Plaintiffs' case as possible during the days the Court has set aside for trial in September and October decreases the likelihood that any witnesses will have to appear at two separate trials; ensures timely resolution of Plaintiffs' claims; and is the most efficient use of

¹ Specifically, the record would remain open to the LULAC Plaintiffs' Voting Rights Act ("VRA") Section 2 claim, *see* ECF No. 207 ¶¶ 249-56 (Count I); the HAUL/MFV Plaintiffs' Fourteenth and Fifteenth Amendment intentional discrimination claims, as well as its VRA Section 2 claim, *see* ECF No. 199 ¶¶ 270-317 (Counts II-IV); and the LUPE Plaintiffs' Fourteenth and Fifteenth Amendment intentional discrimination claims, as well as VRA Section 2 claim, *see* ECF No. 208 ¶¶ 230-265 (Counts II-IV).

the Court's limited trial time. Plaintiffs' proposal will also make scheduling a Phase II trial simpler by shortening its length and narrowing the evidence to be presented.

Finally, the Plaintiffs' proposal will make the Phase I trial administratively simpler for the Court. In negotiations regarding trial procedures, State Defendants have indicated that, if the Court adopts a strict bifurcation between "impact" and "intent" claims, any evidence bearing on Plaintiffs' intent claims should not be presented during Phase I. That cabined approach is not an efficient use of the Court's limited trial availability and would likely necessitate a longer Phase II trial. It would also require the Court to repeatedly make determinations during Phase I as to whether evidence speaks to "impact" or "intent" even though much of Plaintiffs' evidence addresses—and is relevant to—allegations involving both intentional discrimination and the discriminatory effects of and burdens associated with the challenged provisions. The Plaintiffs' proposal resolves this problem by making clear that effects and available intent evidence may be presented during Phase I as time permits, relieving the Court of the line-drawing exercise the State Defendants wish to impose.

A proposed order adopting the Private Plaintiffs' proposed scope of the Phase I trial is attached.

II. Length of Trial

The Private Plaintiffs have made significant efforts to reduce the length of trial since filing their joint witness list on July 28, including by moving several witnesses from "will call" to "may call," working with the District Attorney defendants, as well as county elections official defendants, to negotiate stipulations that will eliminate the need for them to testify live at trial, and eliminating several other witnesses altogether. Similarly, the United States and OCA Plaintiffs have advised the Court that, if the Court determines it can resolve their Section 101 Materiality

Provision claims on the summary judgment papers, the United States will no longer need to present any witnesses at trial and the OCA Plaintiffs will be able to remove a substantial number of witnesses from the Private Plaintiffs' joint witness list. *See* ECF No. 701. Plaintiffs estimate that this proposal alone would eliminate approximately 30 hours of trial time alone, plus additional time from Defendants' cross-examination. Finally, Private Plaintiffs propose that direct examination of witnesses be permitted, at the examining party's option, through a combination of live testimony and deposition designations. Similar efforts to reduce further the Private Plaintiffs' witness list are ongoing. *See* ECF 703 at 1 (explaining Private Plaintiffs remain in the process of culling their joint witness list).²

While the Plaintiffs continue to make additional efforts to further reduce anticipated trial time, at present they estimate the following amount of time for their affirmative cases, depending on whether the Materiality Provision claims can be resolved through summary judgment:

- Private Plaintiffs (with Materiality Provision claims): 58 Hours
- Private Plaintiffs (without Materiality Provision claims): 43 Hours

Private Plaintiffs believe these numbers represent outer bound estimates that are likely to come down as they continue to cull their witness list and identify additional ways to shorten their trial presentation. As explained in their August 10 motion, the Private Plaintiffs are not presently able to provide an estimated time for their cross-examinations but will be able to do so by no later than August 18. *See* ECF 703.

The United States anticipates requiring no more than 17.5 hours of trial time for its affirmative case and cross-examination of Defense witnesses (including may-call witnesses).

² To further accommodate Defendants, the Private Plaintiffs have also removed deposition designations from witnesses designated as "will call," though they reserve their right to use such deposition testimony "for any purpose" as permitted by Federal Rule of Civil Procedure 32(a)(3).

Accordingly, depending on whether their Materiality Provision claims can be resolved through summary judgment, the United States' estimated trial time is as follows:

- United States (with Materiality Provision claims): 17.5 hours (*including cross-examination*)
- United States (without Materiality Provision claims): 0 hours

III. Date and Subject of Witness Testimony

The Court has asked the parties to identify “which witnesses are expected to testify on which days and the subject of their testimony.” ECF No. 700 at 2. The Court’s Deputy has also asked the parties to provide, at their earliest convenience, the identity of counsel expected to conduct direct and cross examinations for each witness. 08.10.2023 Email from S. Fernandez.

The Private Plaintiffs have moved for an extension of time to comply with this request, *see* ECF No. 703, and have indicated that, by August 18, they anticipate being able to provide a revised witness list reflecting their ongoing efforts to reduce witnesses, a proposed trial schedule identifying which week they expect specific witnesses to testify, and the subject of specific witnesses’ testimony.

IV. Trial Dates

The Court’s Amended Order provides a list of available dates for trial proceedings. *See* ECF No. 700 at 3. The Private Plaintiffs respectfully ask that the following dates be reserved for trial: September 11-14; September 19-22; October 2-6; October 10-12; and October 16-20. Based on prior discussions with counsel for Defendants in which they have indicated that they plan to reserve an amount of time equal to Plaintiffs for their case, the Private Plaintiffs anticipate that these dates should suffice to complete the Phase I trial.

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Respectfully submitted,

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The undersigned counsel hereby certifies that he has electronically submitted a true and correct copy of the above and foregoing via the Court's electronic filing system on the 11th day of August 2023.

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